

DOMESTIC VIOLENCE TRIAL NOTEBOOK

Presented by: Libby Shelton, Associate City Prosecutor

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**QUALIFYING OFFENSES -
MISDEMEANORS**

- Criminal Trespass 3rd Degree (13-1502)
- Criminal Trespass 2nd Degree (13-1503)
- Criminal Trespass 1st Degree (13-1504)*
 - File Notice of Prosecutor Review and Request to Treat Citation as Long Form Complaint
- Criminal Damage (13-1602)
- Interfering with Judicial Proceedings (13-2810)
- Custodial Interference (13-1302)
 - If child voluntarily returned, uninjured, or less than 48 hours
- Harassment (13-2921)

- Disorderly Conduct (13-2904(A))(1,2,3, 6)
- Preventing the Use of a Telephone in an Emergency
- Use of Telephone to Tattle (13-2916)
- Threatening or Intimidating (13-1202)
- Assault (13-1203)
- Endangerment (13-1201)
 - Risk of Physical Injury
- Unlawful Imprisonment (13-1303)
 - If victim released voluntarily

QUALIFYING RELATIONSHIPS

- ARS 13-3601 (A)(1-6)
- 1) Marriage or Former Marriage; Residing or previously residing in same household
- 2) Child in Common
- 3) Pregnancy
- 4) Related by
 - Blood or Court Order as parent, grandparent, child, grandchild, brother or sister
 - Marriage as parent-in-law, grandparent-in-law, stepparent, step-grandparent, stepchild, step-grandchild, brother-in-law, or sister-in-law
- 5) Child who resides or has resided in same household as Defendant and is related by blood to a former spouse of the defendant or to a person resides or has resided in same household as Defendant
- 6) Current or previous romantic or sexual relationship

QUALIFYING RELATIONSHIPS

ROMANTIC/SEXUAL RELATIONSHIP FACTORS:

- 1) Type of Relationship
- 2) Frequency of Interaction
- 3) Length of Relationship
- 4) Time since break-up

PREPARING FOR DOMESTIC VIOLENCE TRIAL

- Review your evidence
 - Statements
 - Victim, Defendant, Witnesses
 - Recorded Statements: 911 call, recorded interviews
 - Other places to look for statements:
 - Statements made to friends/family
 - Social media, text messages, email
 - Statements made to obtain/quash Order of Protection
- Photos
- Court Orders
- Medical Records

PREPARING FOR A DOMESTIC VIOLENCE TRIAL

- PRETRIAL CHECKLIST
 - Disclosure completed?
 - Includes disclosing felonies/truthfulness convictions for State's witnesses
 - Rule 609
 - Prior felonies of Defendant
 - Truthfulness
 - Motion disclosure
 - Mutual Arrests
 - Use Immunity Motion

PREPARING FOR A DOMESTIC VIOLENCE TRIAL

- Prepare for a Recanting/Absent Victim in EVERY domestic violence case
- Gather every statement made by the Victim
 - Subpoena every person that the victim made a statement to for possible impeachment and to possibly admit statement as a hearsay exception
- Know Demeanor of Victim During Each Statement
- Know Length of Time between the event and the statement

PREPARING FOR DOMESTIC VIOLENCE TRIAL

Add Elements of each crime that you have to prove and know your caselaw.

Examine whether or not you are able to proceed on elements you have to prove without victim.

TRIAL IN ABSENTIA

- Arizona Criminal Rule 9.1 advised
- The trial court may infer that a defendant's absence is voluntary if the defendant had personal knowledge of the time of the proceeding, his right to be present and the warning that the proceeding would take place in his absence if he failed to appear. *State v. Muniz-Caudillo*, 185 Ariz. 261, 914 P.2d 1353 (App. 1996). Defendant did not appear at any pretrial dates and wasn't there when trial set.
- Once 9.1 advisory demonstrated, the trial court can presume absence is voluntary and burden is on defendant to demonstrate otherwise. *State v. Fristoe*, 135 Ariz. 25, 658 P.2d 825 (App. 1982)

MENTAL STATES

- **"Intentionally" or "with the intent to"** means, with respect to a result or to conduct described by a statute defining an offense, that **a person's objective is to cause that result or to engage in that conduct.** ARS 13-105(10)(a)

MENTAL STATES

- **"Knowingly"** means, with respect to conduct or to a circumstance described by a statute defining an offense, that **a person is aware or believes that the person's conduct is of that nature or that the circumstance exists.** It does not require any knowledge of the unlawfulness of the act or omission. ARS 13-105(10)(b)

MENTAL STATES

- **"Recklessly"** means...**a person is aware of and consciously disregards a substantial and unjustifiable risk that the result will occur or that the circumstance exists.** The risk must be of such nature and degree that **disregard of such risk constitutes a gross deviation from the standard of conduct that a reasonable person would observe in the situation.** A person who creates such a risk but who is unaware of such risk solely by reason of voluntary intoxication also acts recklessly with respect to such risk. ARS 13-105(10)(c)

ASSAULT

Assault(A)(1) ARS 13-1203(A)(1)

- A person commits assault by:
 1. Intentionally, knowingly or recklessly causing any **physical injury** to another person
- Intentionally/Knowingly = Class 1 misdemeanor
- Recklessly = Class 2 misdemeanor
- "physical injury" ARS 13-105: means the impairment of physical condition – look for scratch, cut, bruise, red mark, swelling, complaints of pain
- ☐ Injury

ASSAULT

Assault (A)(2) ARS 13-1203(A)(2)

- A person commits assault by:
 2. Intentionally placing another person in **reasonable apprehension of imminent physical injury**
- Class 2 misdemeanor
- Examples: throwing something and missing, hitting and missing, strangulation
- **NOT** a lesser included offense of Assault 13-1203(A)(1) because each offense contains elements distinct from other. *State v. Sanders*, 205 Ariz. 208, 68 P.3d 434 (App. 2003).
- ☐ Reasonable Person would fear injury

ASSAULT

Assault (A)(3) ARS 13-1203(A)(3)

- A person commits assault by:
 3. Knowingly **touching another person with the intent to injure, insult or provoke** such person
- Class 3 misdemeanor
- Needs not be person-to-person contact, includes actions like spitting and/or throwing liquids at another person. *State v. Matthews*, 130 Ariz. 46, 633 P.2d 1039 (App. 1981).
- **NOT** a lesser included offense of assault as defined by ARS 13-1203(A)(1) because each offense contains elements distinct from other. *In re Jeremiah T.*, 212 Ariz. 30, 126 P.3d 177 (App. 2006).
- Examples: push, slap, hit, throwing something, etc
- ☐ Touch to injure/insult/provoke

DISORDERLY CONDUCT

Disorderly Conduct 13-2904

- A. A person commits disorderly conduct if, with intent to disturb the peace or quiet of a neighborhood, family or person, or with knowledge of doing so, such person:
 1. Engages in fighting, violent or seriously disruptive behavior; or
 2. Makes unreasonable noise; or
 3. Uses abusive or offensive language or gestures to any person present in a manner likely to provoke immediate physical retaliation by such person;

DISORDERLY CONDUCT

- Depending on which subsection is alleged to have been violated, a single act of disorderly conduct can encompass multiple victims and give rise to multiple counts. *State v. Burdick*, 211 Ariz. 583, 125 P.3d 1039 (App. 2005)
- Not required to prove victim "at peace" – must just prove the commission of certain acts "with intent to disturb the peace... or with knowledge of doing so." *State v. Miranda*, 200 Ariz. 67, 22 P.3d 506 (2001).
- Don't have to show specific neighbor disturbed, use "reasonable man" (objective) standard. *State v. Johnson*, 112 Ariz. 383, 542 P.2d 808 (1975); *In re Julio L.*, 197 Ariz. 1, 3 P.3d 385.

THREATS AND INTIMIDATION

Threats and Intimidation ARS 13-1202

- A. A person commits threatening or intimidating if the person threatens or intimidates by word or conduct:
 1. To cause physical injury to another person or serious damage to the property of another;
- Class 1 Misdemeanor
- ☐ Threat to cause physical injury; OR
- ☐ Threat to damage property

THREATS AND INTIMIDATION

- State must establish that Defendant made a "true threat." "(A) reasonable person would foresee that [Defendant's] words would be taken as a serious expression of an intent to inflict bodily harm, and Defendant's statements were not the result of mistake, duress, or coercion." *In Re Kyle M.*, 200 Ariz. 447, 27 P.3d 804 (App. 2001).
- Test: "would a reasonable person foresee that the statement would be understood by those who heard the statement as a genuine threat to inflict harm." *In re Ryan A.*, 202 Ariz. 19, 39 P.3d 543 (App. 2002). We don't have to prove that victim felt threatened.
- Threat need not be heard by victim to result in criminal liability. *Matter of Juvenile Action No. 55*, 123 Ariz. 434, 435, 600 P.2d 47, 48 (App. 1979)

CRIMINAL DAMAGE

Criminal Damage ARS 13-1602

- A. A person commits criminal damage by:
 1. Recklessly defacing or damaging property of another person; or
 2. Recklessly tampering with property of another person so as substantially to impair its function or value
- \$250-less than \$1000 in damage – Class 1 misdemeanor
- Less than \$250 – Class 2 misdemeanor
- ☐ Greater than \$250, if needed
- ☐ Property of another
- ☐ Damage/tampering to impair

CRIMINAL DAMAGE

- Property of another person is "any property in which the defendant has **anything less than exclusive ownership**" *State v. Superior Court (Moore)*, 188 Ariz. 372, 936 p.2D 558 (App. 1997).
- Community property is "property of another person". ARS 13-1601
- "Damage" means any physical or visual impairment of any surface. ARS 13-1701

CRIMINAL DAMAGE

- State has burden of establishing the amount of damages and demonstrating method used to calculate amount. *State v. Brockell*, 187 Ariz. 226, 928 P.2d 650 (App. 1996)
- "[T]he absence of the property owner's permission, though unstated, is a necessary and implicit element of the crime." *State v. Moran*, 162 Ariz. 524, 784 P.2d 730 (App. 1989).

INTERFERENCE WITH JUDICIAL PROCEEDINGS

Interference with Judicial Proceedings ARS 13-2810

- A. A person commits interfering with judicial proceedings if such person knowingly:
- 2. **Disobeys or resists the lawful order, process or other mandate of a court;**
- Class 1 Misdemeanor
- ☐ Order valid on date of offense
- ☐ Date of Service on Defendant
- ☐ Admit Order and Proof of Service

INTERFERENCE WITH JUDICIAL PROCEEDINGS

- Admit certified order and proof of service as self-authenticating **certified public record** pursuant to Rule 902(4) of the Rules of Evidence
 - Have court take Judicial Notice of date order was issued and date of service
- ARS 13-109 Jurisdiction
- A. Criminal prosecutions shall be tried in the county in which conduct constituting any element of the offense or a result of such conduct occurred, unless otherwise provided by law.

CRIMINAL TRESPASS 3RD DEGREE

Criminal Trespass in the 3rd Degree ARS 13-1502

- A. A person commits criminal trespass in the third degree by:
 1. Knowingly entering or remaining unlawfully on **any real property** after a reasonable **request to leave** by a law enforcement officer, the owner or any other person having lawful control over such property, or reasonable notice prohibiting entry.
- Class 3 misdemeanor
- ☐ Real Property
- ☐ Request to Leave by police/owner

CRIMINAL TRESPASS 3RD DEGREE

- "Enter or remain unlawfully" means an act of a person who enters or remains on premises when the person's **intent for so entering or remaining is not licensed, authorized or otherwise privileged** except when the entry is to commit theft of merchandise displayed for sale during normal business hours, when the premises are open to the public and when the person does not enter any unauthorized areas of the premises. ARS 13-1501

CRIMINAL TRESPASS 2ND DEGREE

Criminal Trespass in the 2nd Degree ARS 13-1503

- A. A person commits criminal trespass in the second degree by knowingly entering or remaining unlawfully in or on any **nonresidential structure or in any fenced commercial yard**.
- Class 2 Misdemeanor
- ☐ Nonresidential structure/fenced commercial yard

CRIMINAL TRESPASS 2ND DEGREE

- "Nonresidential structure" means **any structure other than a residential structure** and includes a retail establishment. ARS 13-1501(10)
- "Fenced commercial yard" means a unit of **real property that is surrounded completely by fences, walls, buildings or similar barriers**, or any combination of fences, walls, buildings or similar barriers.... ARS 13-1501(4)
- Salvation Army collection box, which had sides and a floor, was a "structure" within meaning of this section providing that a person commits burglary in third degree by entering or remaining unlawfully in nonresidential structure with intent to commit any theft therein. *State v. Mann*, 129 Ariz. 24, 628 P.2d 61 (App. 1981).

CRIMINAL TRESPASS 1ST DEGREE

Criminal Trespass in the 1st Degree ARS 13-1504

- A. A person commits criminal trespass in the first degree by knowingly:....
 2. Entering or remaining unlawfully in a **fenced residential yard**.
 3. Entering any residential yard and, without lawful authority, **looking into the residential structure** thereon in reckless disregard of infringing on the inhabitant's right of privacy.
- Class 1 misdemeanor
 - ☐ In yard/looking in house

CRIMINAL TRESPASS 1ST DEGREE

- "Fenced residential yard" means a unit of real property that **immediately surrounds or is adjacent to a residential structure and that is enclosed by a fence**, wall, building or similar barrier or any combination of fences, walls, buildings or similar barriers. ARS 13-1501(5)
- "Residential structure" means any structure, movable or immovable, permanent or temporary, that is **adapted for both human residence and lodging whether occupied or not**. ARS 13-1501(11)

CRIMINAL TRESPASS 1ST DEGREE

Criminal Trespass in the 1st Degree ARS 13-1504

- **A.** A person commits criminal trespass in the first degree by knowingly:
 1. Entering or remaining unlawfully in or on a residential structure
- Class 6 Felony
- ☐ Inside house without permission

PREVENTING USE OF TELEPHONE IN AN EMERGENCY

Preventing Use of a Telephone In an Emergency ARS 13-2915(A)(3)

- (A) It is unlawful for a person to do any of the following:
 - (3) **Intentionally prevent or interfere with the use of a telephone** by another person in an **emergency situation**.
- Class 2 Misdemeanor
- ☐ Prevent/Interfere with phone
- ☐ Emergency situation

PREVENTING USE OF TELEPHONE IN AN EMERGENCY

"Emergency situation" means a situation in which both of the following apply:

(a) Human health, life or safety is in jeopardy and the prompt summoning of aid is essential.

AND

(b) It is reasonable to believe that a domestic violence offense pursuant to ARS 13-3601 is being, has been or is about to be committed

ELECTRONIC COMMUNICATIONS CRIMES

Use of electronic communication to terrify, intimidate, threaten or harass ARS 13-2914

- A. It is unlawful for any person, with intent to **terrify, intimidate, threaten or harass a specific person** or persons, to do any of the following:
 1. Direct any obscene, lewd or profane language or suggest any lewd or lascivious act to the person in an electronic communication.
 2. Threaten to inflict physical harm to any person or property in any electronic communication.
 3. Otherwise disturb by repeated anonymous, unwanted or unsolicited electronic communications the peace, quiet or right of privacy of the person at the place where the communications were received

ELECTRONIC COMMUNICATIONS CRIMES

- Class 1 Misdemeanor
- B. Any offense committed by use of an electronic communication as set forth in this section is deemed to have been committed **at either the place where the communications originated or at the place where the communications were received.**
- E. For the purposes of this section, "electronic communication" means a wire line, cable, wireless or cellular telephone call, a text message, an instant message or electronic mail.
- First Amendment is not implicated. *State v. Hagen*, 27 Ariz.App. 722, 558 P.2d 750 (App. 1977)

HARASSMENT

Harassment ARS 13-2921

- A. A person commits harassment if, with intent to harass or with knowledge that the person is harassing another person, the person:**
1. Anonymously or otherwise **contacts, communicates or causes a communication with another person** by verbal, electronic, mechanical, telegraphic, telephonic or written means in a **manner that harasses.**
 2. Continues to **follow another person** in or about a public place for no legitimate purpose **after being asked to desist.**
 3. Repeatedly **commits an act or acts that harass** another person.
 4. **Surveils** or causes another person to surveil a person for no legitimate purpose.
 5. **On more than one occasion makes a false report** to a law enforcement, credit or social service agency.
 6. **Interferes with the delivery of any public or regulated utility** to a person.

HARASSMENT

- Class 1 misdemeanor
- E. For the purposes of this section, "harassment" means conduct that is **directed at a specific person** and that would cause a **reasonable person to be seriously alarmed, annoyed or harassed and the conduct in fact seriously alarms, annoys or harasses the person.**
- Statute "regulates neither constitutionally protected speech nor expressive conduct and, thus, does not implicate the First Amendment." *State v. Brown*, 207 Ariz. 231, 85 P.3d 109 (App. 2004)

UNLAWFUL IMPRISONMENT

Unlawful Imprisonment ARS 13-1303

- A. A person commits unlawful imprisonment by **knowingly restraining** another person.
- Class 1 Misdemeanor if the victim is released voluntarily by the defendant without physical injury in a safe place prior to arrest

UNLAWFUL IMPRISONMENT

- "There need not be actual force; the restraint may be from the **fear of force as well as from force itself. Words alone are frequently sufficient** to bring about the actual restraint of liberty. False imprisonment may be committed by words alone, or by acts alone, or by both, or by merely operating the will of the individual." *Swetnam v. FW Woolworth Company*, 83 Ariz. 189, 318 P.2d 364 (1957).

ENDANGERMENT

Endangerment ARS 13-1201

- **A. A person commits endangerment by recklessly endangering another person with a substantial risk of imminent death or physical injury.**
- B. Endangerment involving a substantial risk of imminent death is a class 6 felony. In all other cases, it is a class 1 misdemeanor.**

ENDANGERMENT

- **Does not required** the person who is endangered **actually be physically injured**. *Campas v. County of Maricopa*, 159 Ariz. 343, 767 P.2d 230 (App. 1989).
- There is **no requirement that the victim be aware of the conduct of the actor**. *State v. Morgan*, 128 Ariz. 362, 625 P.2d 951 (App. 1981)

CUSTODIAL INTERFERENCE

CUSTODIAL INTERFERENCE ARS 13-1302

- **A. A person commits custodial interference if, knowing or having reason to know that the person has no legal right to do so, the person does one of the following:**
 1. **Takes, entices or keeps from lawful custody** any child, or any person who is incompetent, and who is entrusted by authority of law to the custody of another person or institution.
 2. **Before the entry of a court order determining custodial rights, takes, entices or withholds any child from the other parent denying that parent access to any child.**
 3. **If the person is one of two persons who have joint legal custody of a child, takes, entices or withholds from physical custody the child from the other custodian.**
 4. **At the expiration of access rights outside this state, intentionally fails or refuses to return or impedes the return of a child to the lawful custodian.**

CUSTODIAL INTERFERENCE

- It is a class 1 misdemeanor if the child or incompetent person is **voluntarily returned** without physical injury by the parent or defendant or the agent of the parent or defendant **no later than forty-eight hours** after the parent or defendant takes, entices or keeps from lawful custody the child or incompetent person. ARS 13-1302(E)(4)
- If a child is born out of wedlock, the mother is the legal custodian of the child for the purposes of this section until paternity is established and custody or access is determined by a court. ARS 13-1302(B)

CUSTODIAL INTERFERENCE

- Possible Defense:
 - It is a defense to a prosecution pursuant to subsection A, paragraph 2 if both of the following apply:
 1. The defendant has begun the process to obtain an order of protection or files a petition for custody within a reasonable period of time and the order of protection or petition states the defendant's belief that the child was at risk if left with the other parent.
 2. The defendant is the child's parent and has the right of custody and the defendant either:
 - (a) Has a good faith and reasonable belief that the taking, enticing or withholding is necessary to protect the child from immediate danger.
 - (b) is a victim of domestic violence by the other parent and has a good faith and reasonable belief that the child will be in immediate danger if the child is left with the other parent.
- ARS 13-1302(C)

CUSTODIAL INTERFERENCE

- Possible Defense:
 - D. Subsection A, paragraphs 2 and 3 do not apply to a person who is the child's parent if both of the following apply:
 1. The person has filed an emergency petition regarding custodial rights with the superior court and has received a hearing date from the court.
 2. The person has a good faith and reasonable belief that the child will be in immediate danger if the child is left with the other parent.
- ARS 13-1302(D)

KNOW YOUR RULES OF EVIDENCE

- To Admit Defendant's Statements
 - RULE 801(d)(2) Party Admission
 - Nonhearsay when Offered Against Party
- Examine Defendant's Statements:
 - How do they square with physical evidence?
 - Are they consistent with witness or victim statements?
 - Are the Defendant's statements consistent?
 - Does the Defendant admit the DV relationship?
- Only State can offer Defendant's statements; if Defendant tries to offer the statements it is self-serving hearsay

KNOW YOUR RULES OF EVIDENCE

- Impeaching an uncooperative victim
 - Rule 801(d)(1)(A) Prior Inconsistent Statement
 - A witness's prior inconsistent statement, who is subject to cross-examination, is **not hearsay**
 - **NO Crawford Issue** because declarant appears and is subject to cross examination
 - It is admissible as **substantive evidence** of a crime *State v. Alfred*, 134 Ariz. 274, 278, 655 P.2d 1326, 1330 (1982).
 - See also *State v. Miller* 187 Ariz. 254, 928 P.2d 678 (App. 1996) – trier of fact's role is to impartially consider the prior statement and evaluate its truth...admission of statement as substantive evidence does not generally pose risk created by hearsay evidence.

KNOW YOUR RULES OF EVIDENCE

Beware!! Under *Alfred*

- The Statement can be excluded under Rule 403 if its probative value is outweighed by danger of prejudice, confusion, or misleading the jury
- Five factors to consider:
 - 1) the witness being impeached denies making the impeaching statement; AND
 - 2) the witness presenting the impeaching statement has an interest in the proceeding and there is no other corroboration that the statement was made; AND
 - 3) There are other factors affect the reliability of the impeaching witness, such as age or mental capacity; AND
 - 4) The true purpose of the offer is substantive use of the statement rather than impeachment of the witness; AND
 - 5) The impeachment testimony is the only evidence of guilt

KNOW YOUR RULES OF EVIDENCE

- "Feigned memory loss" and Rule 801(d)(1)
 - A "claimed inability to recall, when disbelieved by trial judge, may be viewed as inconsistent with previous statements." *State v. Hausner*, 230 Ariz. 60, 76, 280 P.3d 604, 620 (2012); *State v. King*, 180 Ariz. 268, 275, 883 P.2d 1024, 1031 (1994).
 - "[I]nconsistency is to be determined, not by individual words or phrases alone, but by the whole impression or effect of what has been said or done." *State v. Hines*, 130 Ariz. 68, 71, 633 P.2d 1384, 1387 (1981).
 - The court "has considerable discretion in determining whether a witness's evasive answers or lack of recollection may be considered inconsistent with that witness's prior out-of-court statements." *State v. Salazar*, 216 Ariz. 316, 319, 166 P.3d 107, 110 (App. 2007).
 - Witness would "rather not say" – prior statement admissible as "prior inconsistent statement" *State v. Joe*, 234 Ariz. 26, 316 P.3d 615 (App. 2014).

KNOW YOUR RULES OF EVIDENCE

- If victim testifies and is uncooperative, statement may also be admitted as a hearsay exception.
- Hearsay Rule 801
 - An out of court statement
 - Can be oral, written, or non-verbal
 - Assertion
 - A question is not an assertion. *State v. Palmer* 229 Ariz. 64, 270 P.3d 891 (App. 2012)
 - Made by a person "declarant"
 - Offered to prove the truth of the matter asserted

KNOW YOUR RULES OF EVIDENCE

- Most common hearsay exceptions in DV cases are:
 - Present Sense Impressions-Rule 803(1)
 - Excited Utterance – Rule 803(2)
 - Then Existing Mental, Emotional or Physical Condition –Rule 803(3)
 - Statement Made for Medical Diagnosis or Treatment-Rule 803(4)
 - Review of trial court's ruling on admissibility of hearsay is abuse of discretion. *State v. Bronson*, 204 Ariz. 321, 63 P.3d 1058 (App. 2003)

HEARSAY EXCEPTIONS

PRESENT SENSE IMPRESSION Rule 803(1)

- A statement describing or explaining an event or condition, made while or immediately after the declarant perceived it.
- "[W]hen the declarant has had little time to reflect on the event she has perceived, her statement will be spontaneous and therefore reliable." *State v. Tucker*, 205 Ariz. 157, 165-166, 68 P.3d 110, 118-119 (2003).

HEARSAY EXCEPTIONS

PRESENT SENSE IMPRESSION, RULE 803(1) CONT...

- Text Message made to friend that "Me and Marcus are fighting" is admissible as present sense impression. Court specifically noted the **present tense of verb**. *State v. Damper*, 223 Ariz. 572, 225 P.3d 1148 (App. 2010)
- **Authentication of Text Message**. Foundation is sufficient when supported by "[t]estimony that a matter is what is claimed to be." Rule 901(b)(1).
- Recipient testified that she saved declarant cell phone number in her phone under nickname, that she often communicated with declarant by text message, and that nickname was displayed when text message came up. *Damper*.

HEARSAY EXCEPTIONS

EXCITED UTTERANCE Rule 803(2)

- A statement relating to a startling event or condition, made while the declarant was under the stress of excitement that it caused.
 - 3 requirements:
 - 1) startling event; and
 - 2) statement must relate to startling event; and
 - 3) statement was made before the declarant had time to fabricate or reflect.
- State v. Jeffers*, 135 Ariz. 404, 661 P.2d 1105 (1983)

HEARSAY EXCEPTIONS

EXCITED UTTERANCE, RULE 803(2)

- Excited utterances of **children** who are incompetent to testify because of their age are **admissible in evidence**. *State v. Bauer*, 146 Ariz. 134, 137, 704 P.2d 264, 267 (App. 1985).
- An excited utterance is **not necessarily inadmissible because it is made in response to a question**. *State v. Johnson*, 183 Ariz. 623, 905 P.2d 1002 (App. 1995).
- The **physical and emotional condition of the declarant** at the time of the statement is made affects spontaneity more than the passage of time. *State v. Beasley*, 205 Ariz. 334, 341, 70 P.3d 463, 470 (App. 2003).

HEARSAY EXCEPTIONS

THEN EXISTING MENTAL, EMOTIONAL, OR PHYSICAL CONDITION Rule 803(3)

A statement of the declarant's then-existing state of mind (such as motive, intent, or plan) or emotional, sensory, or physical condition (such as mental feeling, pain, or bodily health), but not including a statement of memory or belief to prove the fact remembered or believed unless it relates to the validity or terms of the declarant's will.

HEARSAY EXCEPTIONS

THEN EXISTING MENTAL, EMOTIONAL, OR PHYSICAL CONDITION Rule 803(3), cont...

"I am going to meet a man who got out of jail for assault a few days ago who owes me \$1100". Court admits statement under hearsay exception for proving that a meeting between defendant and victim took place because it showed state of mind (ie intent and/or plan). *State v. Prince*, 160 Ariz. 268, 772 P.2d 1121 (1989).

HEARSAY EXCEPTIONS

STATEMENT MADE FOR MEDICAL DIAGNOSIS OR TREATMENT Rule 803(4)

- Statements made for purposes of medical diagnosis or treatment and describing medical history, or past or present symptoms, pain or sensations or the inception or general character of the cause or external source thereof insofar as reasonably pertinent to diagnosis or treatment."
- If there is a Crawford objection – this is a statement made to a non-government agent for medical treatment = nontestimonial

HEARSAY EXCEPTIONS

State v. Hill, 236 Ariz. 162, 336 P.3d 1283 (App. 2014)

- Forensic nurse conducts examination with two components: 1) providing medical care; and 2) collecting DNA evidence
- Officer not present during examination
- Question asked "tell me why you're here?"
- Was primary purpose of exchange to gather evidence or provide medical care?
- If objective circumstances indicate statement was made in connection with the provision of emergency medical care, the statement is likely non-testimonial.
- Court finds open ended question was not aimed at collecting evidence but at gathering information about victim's medical condition

CRAWFORD ISSUES

- 6th Amendment "In all criminal prosecutions, the accused shall enjoy the right... to be confronted with the witnesses against him."
- Testimonial statements are no longer admissible in court unless 1) the witness takes the stand; AND 2) the witness is subject to cross examination.
Crawford v. Washington, 541 U.S. 36 (2004).

CRAWFORD ISSUES

- What is a testimonial statement?
- Whether a statement is testimonial "is a factually driven inquiry and must be determined on a case-by-case basis." *State v. Alvarez*, 213 Ariz. 467, 471, 143 P.3d 668, 672 (App.2006).
- Is primary purpose of statement to meet an ongoing emergency or for future prosecution?
- Statements made during a DV emergency are nontestimonial if made for primary purpose of addressing an ongoing emergency. *Davis v. Washington*, 547 U.S. 813 (2006)
 - 911 calls, statements made to non-govt agents
- If the police arrive subsequent to a domestic disturbance and statements are made to police agents about past events for purpose of future prosecution, they are testimonial. *Hammon v. Indiana*, 547 U.S. 813 (2006)

911 CALLS

- ARS 13-3989.01 – establishes foundation
- A. The records and recordings of 911 emergency service telephone calls are admissible in evidence in any action without testimony from a custodian of records if the records and recordings are accompanied by the following signed form:
 The accompanying records and recordings and explanatory material are from the [name of agency] public safety answering point communications facility. This form authenticates [number] pages. This form authenticates [number] tapes. These documents and tapes pertain to: case number _____, department report number _____, call receipt date and time _____, caller name _____, call origination location address _____, originating telephone number _____, dispatch time _____, arrival time _____.
 Signed: _____ Custodian of records.
- B. 911 emergency records and recordings and any copies of the records and recordings that comply with subsection A of this section are deemed to be authenticated pursuant to rule 901(b)(10) of the Arizona rules of evidence.

911 CALLS

- If 911 witness present, there is no Crawford issue, but still need nonhearsay or a hearsay exception to admit it:
- Nonhearsay Rule 801(d)(1) – Prior inconsistent statement
- Hearsay Exceptions:
 - Present Sense Impression
 - Excited Utterance
 - Statement for Medical Diagnosis/Treatment

911 CALLS

- If 911 caller not present, must show:
 - 1) witness unavailable
 - 2) nontestimonial
 - *Davis v. Washington*, 547 US 813 if 911 call addressing ongoing emergency it is nontestimonial
 - Statement made to non-government agent, made under stress, initiated by declarant, seeking medical treatment
 - Was the statement made in aid of future prosecution?
 - 3) hearsay exception

911 CALLS

- If person who made call is present, play brief portion for witness before trial so that they can identify their own voice
- Before playing, move to admit it pursuant to ARS 13-3989.01
- Be prepared for objection, and prepare to argue:
 - Relevance and whether it is more probative than prejudicial
 - Nonhearsay (impeachment)
 - Hearsay exception
- May need to be very specific in trial notes regarding times of statements in 911 call, because portions of the 911 call may not be admissible

911 CALLS

- Prior Consistent Statement Rule 801(d)(1)(B)
 - If Defense questioning raises:
 - 1) Express/Implied charge of fabrication; OR
 - 2) Improper Motive or Influence While Testifying
 - Then can move to admit 911 call if consistent with declarant's testimony at trial

PREPARE FOR DEFENSES

- **Affirmative Defenses**
 - Must be proven by preponderance of evidence ARS 13-205
- **Justification – NOT affirmative defense**
 - conduct that, if not justified, would constitute an offense but, if justified, does not constitute criminal or wrongful conduct ARS 13-205
 - If justification raised by defense, the state must prove beyond a reasonable doubt that the defendant did not act with justification. ARS 13-205

PREPARE FOR DEFENSES

Justification

- **Self Defense ARS 13-404:** a person is justified in threatening or using physical force against another when and to the extent a reasonable person would believe that physical force is immediately necessary to protect himself against the other's use or attempted use of unlawful physical force.

PREPARE FOR DEFENSES

- Self Defense, ARS 13-404 **continued**
- **B.** The threat or use of physical force against another is not justified:
 1. In response to verbal provocation alone; or
 2. To resist an arrest that the person knows or should know is being made by a peace officer or by a person acting in a peace officer's presence and at his direction, whether the arrest is lawful or unlawful, unless the physical force used by the peace officer exceeds that allowed by law; or
 3. If the person provoked the other's use or attempted use of unlawful physical force, unless:
 - (a) The person withdraws from the encounter or clearly communicates to the other his intent to do so reasonably believing he cannot safely withdraw from the encounter; and
 - (b) The other nevertheless continues or attempts to use unlawful physical force against the person.

*"reasonable person" standard State v. King, 225 Ark. 87 (2010)

PREPARE FOR DEFENSES

- Defense of Property ARS 13-407 reasonable person would believe "force/threat of force" immediately necessary to prevent or terminate the commission or attempted commission of a criminal trespass by the other person in or upon the premises
- Defense of Property 13-408 to prevent theft/criminal damage of property under control

PREPARE FOR DEFENSES

- Justification: Prior Domestic Violence ARS 13-415
- If there have been past acts of domestic violence as defined in § 13-3601, subsection A against the defendant by the victim, the state of mind of a reasonable person under §§ 13-404, 13-405 and 13-406 shall be determined from the perspective of a reasonable person who has been a victim of those past acts of domestic violence.

PREPARE FOR DEFENSES

- **Rule 404(a)(1) – Character of accused**
 - Pertinent character trait offered by accused
 - For example, peacefulness in assault case
 - BUT... once they open that door... the prosecution can offer evidence of a violent character to "rebut the same"

PREPARE FOR DEFENSES

- **Rule 404(a)(2) – Character of victim**
 - Pertinent character trait of victim
 - For example, victim's violent tendencies in an assault case
 - BUT...once they open the door... the prosecution can offer evidence of a peaceful character to "rebut the same"

PREPARE FOR DEFENSES

- **Rule 404(b) – Other crimes, wrongs, acts**
 - Generally inadmissible, but may be admissible for:
 - 1) proof of motive
 - 2) opportunity
 - 3) intent
 - 4) preparation
 - 5) plan
 - 6) knowledge
 - 7) identity; or
 - 8) Absence of mistake or accident

PREPARE FOR DEFENSES

- **Spousal Privilege**
 - ARS 13-4062 (1) :
 - "do not apply in a criminal action or proceeding for a crime committed by the husband against the wife, or by the wife against the husband..."

REBUT DEFENSES

- If Defendant makes express or implied charge of recent fabrication OR improper motive/influence while testifying, then
- **PRIOR CONSISTENT STATEMENT Rule 801(d)(1)(B) Nonhearsay**
- A [PRIOR] statement is not hearsay if... the declarant testifies at the trial or hearing and is subject to cross-examination concerning the statement and the statement is.... (B) **consistent with the declarant's testimony and is offered to rebut an express or implied charge against the declarant of recent fabrication or improper influence or motive.**

QUESTIONS?

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